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No. 06-

IN THE

Supreme Court of the United States

MCGLADREY & PULLEN, LLP,

Petitioner,

v.

NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court reviewing a state professional regulatory board's decision that prohibits allegedly misleading commercial speech should review the record *de novo* to determine whether the speech is misleading and the prohibition is constitutional.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption.

Petitioner McGladrey & Pullen, LLP, has no parent company, and no publicly held company owns 10 percent or more of petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner McGladrey & Pullen, LLP, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina in this case.

OPINIONS BELOW

The per curiam affirmance of the Supreme Court of North Carolina was entered on April 7, 2006, and is included in the Appendix ("App.") at 1a. It has been officially reported and can be found at *McGladrey & Pullen, LLP* v. *North Carolina State Board of Certified Public Accountant Examiners*, 627 S.E.2d 461 (N.C. 2006). The opinion of the Court of Appeals of North Carolina was entered on July 19, 2005, and is included in the Appendix at 2a-16a. That opinion has also been reported and can be found at *McGladrey & Pullen, LLP* v. *North Carolina State Board of Certified Public Accountant Examiners*, 615 S.E.2d 339 (N.C. Ct. App. 2005). The order

of the Superior Court of Wake County was entered on March 18, 2004, and is included in the Appendix at 17a-20a. The declaratory ruling of the North Carolina State Board of Certified Public Accountant Examiners was entered on April 28, 2003, and is included in the Appendix at 21a-24a.

JURISDICTION

The Supreme Court of North Carolina entered its opinion and judgment on April 7, 2006. On June 23, 2006, the Chief Justice extended the time for filing this petition up to and including August 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Amendment I of the United States Constitution provides, in pertinent part, as follows, "Congress shall make no law ... abridging the freedom of speech."

Title 21, section 8N .0307(a)-(b) of the North Carolina Administrative Code provides, in pertinent part, as follows:

> (a) Deceptive Names Prohibited. A CPA or CPA firm shall not trade upon the CPA title through use of any name that would have the capacity or tendency to deceive.... The name of a non-CPA owner in a CPA firm name is prohibited.
>
> (b) Style of practice. It is considered misleading if a CPA firm practices under a name or style which would tend to imply the existence of a partnership or registered limited liability partnership or professional corporation or professional limited liability company of more than one CPA shareholder or CPA member or an association when in fact there is no partnership nor is there more than one CPA shareholder or CPA member of a CPA firm. For example, no CPA firm having just one CPA owner may have as a part of its name the words

"associates," "group," or "company" or their abbreviations....

STATEMENT OF THE CASE

A. Nature Of The Case.

Petitioner, a leading national accounting firm, seeks to change its name from "McGladrey & Pullen, LLP," to "RSM McGladrey & Pullen, LLP, Certified Public Accountants." This change is designed to reflect McGladrey's affiliation with RSM International, Inc. ("RSMI"), an international affiliation of accounting and consulting firms, and to identify it clearly as a CPA firm within the broader organization. Petitioner requested approval of this change from the relevant professional regulatory boards in every state in which petitioner was doing business, including respondent, the North Carolina State Board of Certified Public Accountant Examiners ("Board"). North Carolina alone rejected the change. After a hearing in which it called no outside witnesses and produced no evidence for its position, the Board rejected the name change because it concluded that the proposed name "has the capacity or tendency to deceive." App. 24a.

Faced with this restriction on the right to communicate its affiliation with RSMI through its brand, petitioner sought judicial review. The North Carolina trial court and Court of Appeals affirmed the Board based on the highly deferential standard of whether "substantial evidence" supported the finding regarding deception. The Supreme Court of North Carolina affirmed without opinion.

This petition seeks review of the North Carolina courts' decision to review the Board's ruling only for "substantial evidence" instead of conducting *de novo* review to determine whether the record supports the restriction on petitioner's commercial speech. Specifically, the court of appeals held that the Board's decision should stand if it was supported by

evidence with which a "reasonable mind" might agree, even if the court would have held otherwise. Such highly deferential review conflicts with decisions of other state supreme courts and this Court, and inadequately protects First Amendment rights. If allowed to stand, this ruling would mark a dramatic break with this Court's longstanding recognition of the role that vigorous judicial review plays in preserving free speech, including commercial speech rights. The absence of meaningful judicial review in cases involving restrictions imposed by state professional regulatory boards is especially harmful because the decisionmakers often are competitors of the entity seeking to gain an advantage by changing its name. Thus, such a board may have a parochial interest in restricting the flow of commercial speech that is a critical component of our free market.

B. Petitioner's Exercise Of Its First Amendment Right To Establish And Promote A Brand.

Petitioner is a national CPA firm with offices across the country, including nine in North Carolina. Petitioner has specialized in providing attest services to mid-sized companies. Its recent growth has positioned it as a strong competitor of the "Big Four" accounting firms in the marketplace for attest services and has raised its profile with major regulators, bankers and investment bankers. "Attest services" include audits, reviews, and compilations of financial statements. See 21 N.C. Admin. Code 8A .0301(b)(5). The term "audit" is sometimes also used to describe certain non-attest services frequently performed by non-CPAs (*e.g.*, "internal audits"). Nonetheless, an audit of a set of financial statements that results in the expression of an opinion as to whether those financial statements have been prepared in accordance with generally accepted accounting principles must be performed by a licensed CPA. See *id.* 8A .0301(b)(6).

In 1999, with the Board's permission, petitioner, which provides attest services, affiliated with RSM McGladrey, Inc.,

a national consulting and tax advisory firm that does not perform attest services (a "non-attest firm"). Collectively, RSM McGladrey, Inc. and petitioner represent the fifth largest accounting and consulting organization in the country with revenues in excess of $1 billion and more than 100 offices nationwide. Petitioner expects to continue its growth and seeks to attract more large, complex, and internationally active clients.

Petitioner and RSM McGladrey, Inc., are both affiliates of RSMI, an affiliation of approximately 100 accounting and consulting firms from 80 countries around the world. Each affiliated firm in the RSM organization is independently operated, and must meet the high standards of RSMI before it is allowed to use the RSM brand. The "RSM" brand is derived from the first initials of the three major accounting firms that founded the RSMI affiliation: Robson Rhodes, LLP, a United Kingdom partnership, Salustro-Reydel, a French accounting firm, and McGladrey & Pullen, LLP.

Petitioner determined in 2002 that it could better inform the public of its affiliation with RSMI and the nature of its services by changing its name to "RSM McGladrey & Pullen, LLP, Certified Public Accountants." Adopting the RSM brand would allow petitioner to compete in the global marketplace by announcing its affiliation with an international organization known for high standards of quality and integrity. Moreover, by adding "Certified Public Accountants" to its name, petitioner sought to announce that, unlike other RSM entities, it could perform attest services, including financial statement audits, in the United States.

C. The Speech Value Of Branding.

A commercial brand name performs multiple functions for companies and consumers. Among other things, a brand enables a consumer to identify the particular good or service being offered; reduces decision costs by facilitating brand loyalty; provides an assurance of consistent quality no matter

where the service is purchased; and enables continuity for a customer that seeks to enjoy a long-term relationship of familiarity with the brand. See Jean-Noël Kapferer, *The New Strategic Brand Management* 23 & tbl.1.5 (2004); Pingjun Jiang, *The Role of Brand Name in Customization Decisions: A Search vs. Experience Perspective*, 13 J. Prod. & Brand Mgmt. 73, 79 (2004). The signaling function of a brand name is critical, because "[c]onsumers treat a brand name as a useful heuristic, or as a proxy for quality determining attributes." Jiang, *supra*, at 79; see also Paul A. Argenti & Bob T. Druckenmiller, Tuck School of Business Working Paper 03-13, *Reputation and the Corporate Brand* 4 (2003), *at* http://ssrn.com/abstract=387860 (noting that a corporate brand "provides consumers with expectations of what the company will deliver"). "Brand equity"—one key component of which is brand awareness—is a "core concept" in marketing. See Pieter Vijn & Frank Verbeeten, NRG Working Paper 06-03, *Do Strong Brands Pay Off? An Empirical Investigation of the Relation Between Brand Asset (TM) Valuator and Financial Performance* 5 (Jan. 2006), *at* http://ssrn.com/abstract=896703. Petitioner is in the process of branding itself as "RSM McGladrey & Pullen, LLP, Certified Public Accountants," to communicate quality, consistency, and continuity to consumers seeking attest services in North Carolina, throughout the United States, and (through its affiliation with RSMI) around the world.

A brand has unique speech effects in the auditing context. In the auditing world, a brand is not only a signal to a prospective client, but also a signal to those who would deal with that client. Audit clients frequently publicize and capitalize on an auditor's brand when they use the auditor's reports for filings with the Securities and Exchange Commission. Clients also benefit from the auditor's reputation for providing independent review of their financial statements when clients are dealing with potential lenders, investors, customers, or vendors. An auditor's brand carries

with it the auditor's reputation for probity and analytic rigor; the more widely known the auditor's brand, the more valuable the reputational effect. A company purchasing audit services thus pays in part for the auditor's brand and the information it conveys; indeed, "[t]he value of an audit ... depends upon the reputation of the accounting firm performing the audit." Michael Firth, *Auditor Reputation: the Impact of Critical Reports Issued by Government Inspectors*, 21 RAND J. Econ. 374, 386 (1990).

Petitioner's proposed brand name also alerts prospective clients that they have access to a wide range of global service providers, all of whom, as affiliates of RSMI, have been prescreened for quality. For example, an American company that wishes to engage auditors for its domestic and British operations would save time, reduce search costs, and limit concerns about corporate compatibility if it knew that it could engage RSM-affiliated entities in both locations to perform those services. Moreover, a global brand communicates increased quality and prestige. Jan-Benedict E.M. Steenkamp et al., Working Paper, *How Perceived Brand Globalness Creates Value* 21 (June 20, 2002), *at* http://ssrn.com/abstract=339365.[1] Communicating with the public through the international "RSM" brand would thus allow petitioner to receive all of the benefits of an international organization without the need and added expense of trying to establish its own presence in each of the 80 countries currently served by RSM affiliates.

Indeed, the importance of brand names is amply demonstrated by the fact that petitioner's competitors have branded themselves. One study has concluded that the ability of the then "Big Six" accounting firms to charge a premium

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[1] Branding also serves as a guarantee of quality, for affiliates who fail to live up to the standards of the brand will either be improved or removed in order to prevent corrosion of the brand for the other affiliates. This is particularly true for companies that, like petitioner, operate in the business-to-business market. *See* Argenti & Druckenmiller, *supra*, at 6-7.

was due to the power of their brand names. See Sati P. Bandyopadhyay & Jennifer L. Kao, *Competition and Big-Six Brand Name Reputation: Evidence from the Ontario Municipal Audit Market* (Jan. 6, 2000), *at* http://ssrn.com/abstract=233398. More recent literature has discussed whether the brand value of the now "Big Four" accounting firms could help those firms to hold off challenges from the next tier of accounting firms, such as petitioner. See Larry Schlesinger, *Insider: Battle of the Brands*, Accountancy Age, Jan. 14, 2004, at 13, *available at* http://www.accountancyage.com/accountancyage/features/2040288/insider-battle-brands. Petitioner's communication with the public through the internationally-known "RSM" brand name is thus vital to competing with the "Big Four" in the United States.

Numerous accounting firms are associated with non-attest firms that share their brands. Deloitte & Touche LLP provides auditing services while numerous non-attest companies provide a variety of services under the Deloitte brand, including Deloitte Consulting LLP and Deloitte Tax LLP. Moreover, through an international association similar to RSMI, these domestic Deloitte companies are associated with the standards of other firms practicing under the Deloitte brand around the world. Other brands, such as BDO Seidman, Ernst & Young, KPMG, and Dixon Odom, are also shared by attest and non-attest companies in North Carolina and elsewhere.

D. The Board's Refusal To Allow The Name Change.

By letters to petitioner dated October 1, 2002, and January 3, 2003, Robert N. Brooks, the executive director of the Board, informed petitioner that its name change would not be allowed because of the possibility that non-attest firms using "RSM" in their name might be confused with "RSM McGladrey & Pullen, LLP, Certified Public Accountants." Petitioner then submitted to the Board a request for a declaratory ruling on the name change. On April 28, 2003,

the Board held a hearing during which no witnesses, other than Mr. Brooks and petitioner's managing partner, were heard, and no evidence was put into the record. Counsel for the Board stated that "we're not insinuating[] that the petitioner is trying to deceive someone," and one of the Board members stated that whether the proposed name is "deceitful or not, we didn't—we don't believe that. It's just that it gets caught in the language of our rules more than anything else."

After the hearing, the Board issued a declaratory ruling finding that the proposed name violated North Carolina Admin. Code Rules 8N .0307(a) and (b), which regulate the permissibility of names for North Carolina CPA firms. Despite the previous indications that petitioner's proposed name was not deceitful, the Board concluded that the proposed name could be deceptive in two ways: 1) by the public incorrectly concluding that "RSM" is a certified public accountant who is one of petitioner's partners; or 2) by the public incorrectly concluding that any entity using the "RSM" brand may practice public accounting (a problem the Board concluded was not alleviated by petitioner's proposal to distinguish itself from other RSM entities by adding "Certified Public Accountants" to its name). App. 21a-24a.

Support for the finding of deception was thin. First, the Board claimed that its "records" indicated that some of petitioner's own licensed staff members had been "confus[ed]," App. 24a, but the Board failed to provide any such records. Second, the Board cited *Hoover's Company Capsule Database* for the proposition that RSM McGladrey, Inc. "is closely associated with the Petitioner." *Id.* at 22a. That database, however, makes clear that RSM McGladrey, Inc. performs "non-attest" services and that petitioner performs "audit and attest" services. The declaratory ruling did not name even one person who had actually confused RSM McGladrey, Inc. with petitioner (much less that any harm ensued), despite the fact that the firms have been affiliated since 1999. Nor did the Board provide any

evidence that anyone had been confused by other brand names shared by attest and non-attest firms in North Carolina and around the world, such as Deloitte, BDO Seidman, Ernst & Young, KPMG, and Dixon Odom.

E. The Judicial Decisions Below.

Petitioner filed a Petition for Judicial Review of the declaratory ruling with the Superior Court of Wake County. The trial court, after determining "whether there was substantial evidence to support the Declaratory Ruling," App. 17a-18a, affirmed the ruling and held "that regulation of a fictitious brand trade name by a state is appropriate because the potential for public deception outweighed the interest of Commercial Free Speech." *Id.* at 19a. The trial court cited no evidence to support its apparent conclusion that petitioner's proposed name change was potentially deceptive.

On appeal, petitioner contended that the North Carolina Court of Appeals should review the record before the Board *de novo* when evaluating the Board's restriction on petitioner's commercial speech. The Board emphasized its belief that the critical question of whether petitioner's proposed speech was misleading should be reviewed for "substantial evidence."

The court of appeals held that under North Carolina law, a "'Court cannot overturn the [Board's] decision if supported by substantial evidence.'" App. 5a-6a. The court held that "substantial evidence" review prevented it from substituting its judgment for that of the agency, so long as the agency's decision was supported by "evidence a reasonable mind might accept as adequate." *Id.* at 5a (internal quotation marks omitted).

The "evidence" that the Board urged before the court had not even been before the Board when it ruled. First, the Board presented SEC filings reporting that RSM McGladrey, Inc. performed four services—"test[ing] systems of internal controls," "internal audit," "due diligence audit," and

"collateral field audit"—that the Board suggested had confused RSM McGladrey, Inc. with petitioner. But none of those services involved *financial statement audits* and are thus proper non-attest services for RSM McGladrey, Inc. to perform. Second, the Board noted that an RSM McGladrey, Inc. employee testified as an auditing expert, another permissible non-attest service. In the end, the Board supported its conclusion that petitioner's name change would be deceptive with evidence that amounted to nothing more than that non-attest services are performed by non-attest RSM entities.

Instead of independently reviewing that evidence to determine whether it justified restricting petitioner's First Amendment rights, the court placed the burden on petitioner to show that the Board's decision was not supported by "substantial evidence." App. 13a. Based on the Board's presentation, the court concluded that "[t]he Board considered and found relevant and substantial evidence tending to show petitioner's proposed name could be confusing and deceptive and determined petitioner's proffered firm name is deceptive to the general public."[2] The court of appeals thus affirmed the declaratory ruling. *Id.* at 8a.

Judge Wynn dissented, concluding that because the "Board has failed to show how the name will be misleading or deceiving," he would have reversed the declaratory ruling. App. 14a. He would have ruled that the potential for deception advanced by the Board was "merely conjecture" and could not satisfy this Court's commercial speech precedents. *Id.* at 15a. Because the court of appeals was divided, petitioner was entitled to automatic review in the

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[2] This passage is unclear as to whether the court believed that the Board had determined that the proposed firm name was "actually or inherently misleading" or only "potentially misleading." As explained *infra* at 15-19, however, a court must review the record *de novo* in either event.

Supreme Court of North Carolina, which affirmed the court of appeals in a *per curiam* order without an opinion.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted because the decision to apply "substantial evidence" review to a state agency's or board's speech restriction conflicts with the decisions of the New Hampshire, Pennsylvania, Iowa and Alabama supreme courts. All of those courts have recognized that a court presented with a free speech challenge to a state board or agency ruling must conduct *de novo* review of facts and law. This Court should resolve that conflict.

The North Carolina courts' deference to the Board here also cannot be squared with the *de novo* review that this Court has applied in similar circumstances. In *Peel* v. *Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91, 108 (1990), a plurality of this Court expressly concluded that a state professional regulatory board's determination that commercial speech falls outside the protection of the First Amendment should be reviewed *de novo*. Even when this Court has not been explicit as to the standard of review it was applying in a particular case, this Court has nevertheless regularly employed the most searching review to determine whether speech restrictions imposed by professional regulatory boards were justified. This approach has been followed both pre- and post-*Peel*. This Court has never sanctioned deference to state professional regulatory boards on vital First Amendment issues, nor should it. State professional regulatory boards for accountants are comprised largely of competitors of those being regulated. Their judgments regarding facts of constitutional significance—such as whether a proposed name is deceptive and hence beyond First Amendment protection—are neither informed by particular expertise nor entirely free from the taint of their competitive interest.

In addition, the impact of the ruling here is not confined to North Carolina, but is in fact of national and even international significance. As noted above, name branding carries powerful speech effects. And a name, by its nature, must be uniform in all jurisdictions in which the firm practices. If a single firm's name varies by jurisdiction, the risk of confusion that supposedly animated the Board's and lower courts' rulings will inevitably arise. Even though every other regulatory board to have been asked would allow petitioner's change, North Carolina's lone refusal effectively prevents the name change everywhere, or creates needless confusion by consumers. This Court is the only body able to provide petitioner relief from North Carolina's nationally restrictive ruling.

1. The North Carolina courts' deference to the Board conflicts with decisions of other state supreme courts. Various state supreme courts have concluded that *de novo* review of a state board or agency decision is required, even as to facts, when the decision is challenged as violating free speech rights. The New Hampshire Supreme Court has held that it must conduct *de novo* review of a state dental board's ruling that advertising is "inherently misleading." *Appeal of Sutfin*, 693 A.2d 73, 75 (N.H. 1997). The dental board in *Sutfin* had parsed the advertisement in question, and made specific findings that certain statements were deceptive to members of the public. *Id.* at 74. Nonetheless, the New Hampshire Supreme Court concluded that it was bound to examine the record for evidence of actual deception, and after finding no such evidence, drew its own conclusions regarding whether the public would be deceived by the advertisement. *Id.* at 75-76.

Other state courts have held *de novo* review is required whenever First Amendment challenges are raised to a state board or agency ruling. *J.S. ex rel. H.S.* v. *Bethlehem Area Sch. Dist.*, 807 A.2d 847, 853 n.7 (Pa. 2002) (treating school district as "local agency for purposes of judicial review" and

stating that "[a]s the issue in this case deals with whether the local agency committed constitutional error, our standard of review is *de novo*"); *Johnson* v. *Charles City Cmty. Sch. Bd. of Educ.*, 368 N.W.2d 74, 84 (Iowa 1985) (noting that "administrative agency's factual determinations are less sacrosanct than usual when the judicial review is of a constitutional question" and that the "authorities which in general require courts to yield to non-arbitrary administrative determinations uniformly provide an exception for constitutional questions"); *Lesiak* v. *Ohio Elections Comm'n*, 716 N.E.2d 773, 775 (Ohio Ct. App. 1998) ("Where constitutional issues such as political speech and freedom of association are presented, the standard of review to be utilized by the reviewing court is a *de novo* review, without deference being given to the agency's decision.").

As the Alabama Supreme Court has concluded:

> In reviewing a claim that an employee has been terminated for exercising the right to free speech, an appellate court must make an independent examination of the whole record, in order to ensure that the judgment of an administrative review panel does not constitute a forbidden intrusion on the field of free expression. This is a rule of Federal constitutional law, reflecting the conviction that judges must exercise independent review in order to preserve these liberties, and this rule is binding upon state appellate courts.

Smith v. *Alabama Aviation & Technical Coll. (Ex Parte Smith)*, 683 So. 2d 431, 436 (Ala. 1996) (citation omitted). The Alabama Supreme Court has thus made clear that not only is *de novo* review appropriate when a state board or agency issues a ruling that restricts free speech, but the Constitution requires such review. The North Carolina courts' application of substantial evidence review here conflicts with the decisions of other state supreme courts, thus warranting this Court's review.

2. This Court has regularly conducted an independent review of decisions of professional regulatory boards that infringe upon commercial speech. The state decisions applying *de novo* review are well grounded in this Court's own rulings. The North Carolina courts' decision to review this ruling for substantial evidence is inconsistent with this Court's repeated application of *de novo* review to state professional regulatory board rulings that infringe on speech. In *Peel*, a plurality of this Court declared *de novo* review to be the rule, while in other cases the Court carried out *de novo* review without so stating. This Court should accept review in this case to make clear that its own consistent practice reflects a controlling rule of law.

Peel presented a challenge to a censure imposed by the Supreme Court of Illinois (acting as the ultimate attorney regulatory board in that state) upon an attorney who advertised himself as a "'Certified Civil Trial Specialist.'" 496 U.S. at 96-98 (plurality opinion). The State argued that the advertisement was inherently or potentially misleading. Any commercial speech deemed to be "inherently misleading" receives no First Amendment protection. *In re R.M.J.*, 455 U.S. 191, 203 (1982).[3] The critical question in such cases, then, turns on whether the challenged speech is, in fact, "inherently misleading."

Justice Stevens, writing for a four-member plurality, held that the advertisement was neither inherently misleading nor potentially misleading and therefore could not be prohibited. *Peel*, 496 U.S. at 102, 107-08. While the State argued that the public might not understand what the certification meant—particularly with respect to whether the state had

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[3] If commercial speech is deemed "potentially misleading," the state may not prohibit it "if the information also may be presented in a way that is not deceptive." *R.M.J.*, 455 U.S. at 203. Whether commercial speech is inherently or potentially misleading, or not misleading at all, is a question that this Court's decisions, discussed in the text, indicate should be reviewed *de novo*.

approved the certification—Justice Stevens scrutinized the record and rejected this "concern about the possibility of deception in hypothetical cases." *Id.* at 111.

The dissent concluded that the advertisement was misleading and properly banned. It strongly disagreed with the plurality's willingness to reject the finding that this certification could be deceptive to the public, and argued that the Court "should be more deferential" to the State's experience and judgment. *Id.* at 121 (O'Connor, J., dissenting). The plurality flatly rejected the suggestion that deference was appropriate here: "Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exercise *de novo* review."[4] *Id.* at 108.

The *Peel* plurality's stated standard of review has been this Court's practice. This Court has regularly performed an independent, nondeferential review of state professional regulatory board decisions that infringe on commercial speech rights.

For instance, the Court overturned a Florida rule that prohibited accountants from soliciting clients in *Edenfield* v. *Fane*, 507 U.S. 761 (1993). In so doing, the Court rejected certain evidence the State relied upon to claim that such solicitations are potentially fraudulent (including the self-serving statement of the board's former chairman). *Id.* at 771-72. Instead, this Court emphasized portions of the record that led it to the contrary conclusion (such as various articles appearing in the professional literature). *Id.* at 772-73.

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[4] Concurring in the judgment, Justices Marshall and Brennan held that the certification was not inherently misleading but was potentially misleading. Because these Justices held that the Illinois regulation at issue was unconstitutional as applied to the petitioner, however, they voted to reverse the censure. *Peel*, 496 U.S. at 111 (Marshall, J., concurring in the judgment). While the concurrence did not expressly address the standard of review it applied, nothing in their disposition of the case indicates that they deferred to the Illinois Supreme Court's findings.

Rather than deferring to the evidence cited by the State, this Court independently reweighed the evidence in the record and concluded that the Board had failed to demonstrate that banning the solicitation of clients was a permissible restriction on commercial speech. *Id.* at 771.

Similarly, a state rule setting various restrictions on an attorney's right to advertise his services was partially rejected in *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626 (1985). The Court first carefully reviewed the record to determine whether the petitioner's advertised willingness to handle Dalkon Shield litigation was the type of inherently misleading speech that could be prohibited *per se*. It held that "we do not believe that the State has presented a convincing case for its argument that the rule before us is necessary." *Id.* at 644. Then on the question of whether an illustration in the advertisement was potentially misleading, the Court held that "none of the State's arguments establish that there are particular evils associated with the use of illustrations in attorneys' advertisements." *Id.* at 648-49. But after closely reviewing the advertisement—not just deferring to the state's reading of it—the Court held that the advertisement's claim that a losing client would owe "'no legal fees'" was misleading because it failed to inform potential clients that they would nevertheless be liable for the costs of the litigation. *Id.* at 652.

In *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), this Court reversed disciplinary sanctions imposed against two young attorneys who advertised the price of their services in violation of state rules. *Id.* at 354-55. While the State put forth no fewer than six justifications to support its rules against price advertising, including that such advertising is either inherently or potentially misleading, the Court carefully reviewed the evidence and assumptions put forth by the State, as well as relevant independent studies. *Id.* at 368-82. After this detailed review of the record, the Court held that "it has

not been demonstrated that the advertisement at issue could be suppressed." *Id.* at 382.

This Court has also prevented a state from relying on rote invocation of a professional regulatory rule to justify a particular speech restriction. In *Ibanez* v. *Florida Department of Business & Professional Regulation*, 512 U.S. 136, 142 (1994), this Court accepted review of a state intermediate appellate court decision and overturned its ruling to restrict the commercial speech of a practicing attorney who wished to advertise that she was a Certified Public Accountant and a Certified Financial Planner. *Id.* at 138. While the state, pointing to its professional regulatory rule, contended that such designations were inherently misleading, the Court held that "[t]o survive *constitutional review*, the Board must build its case on specific evidence." *Id.* at 144 (emphasis added). After closely reviewing the evidence marshaled by the state, the Court found the state's evidence insufficient, and it reversed the ban on the advertisement. *Id.* at 148.[5]

Even when this Court *has upheld* a commercial speech restriction imposed by a state professional regulatory board, it has done so only after first satisfying itself that the record justified the restriction. See, *e.g.*, *Zauderer*, 471 U.S. at 652. For example, in *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618 (1995), the Court upheld a Florida rule prohibiting lawyers from mailing solicitations to accident victims until 30 days following the accident. "After scouring the record,"

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[5] On other occasions, this Court has not hesitated to reject commercial speech regulations in similar circumstances that, after its own independent review, were determined to be unsupported by the record. *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466, 477-78 (1988) (rejecting restriction on attorney's right to mail letters offering his services to individuals facing foreclosure, noting that the record "furnish[ed] no evidence" that the mailing was misleading because it would convey a false impression of the attorney's familiarity with the individuals' cases); *R.M.J.*, 455 U.S. at 205-07 (rejecting restriction on attorney's advertising because nothing in the record indicated that the speech was misleading).

which included the results of a two-year study by the Florida Bar into the effects of lawyer advertising, *id.* at 626, 628, and even going so far as to independently look for contrary evidence, *id.* at 634, the Court held that such solicitations created "demonstrable detrimental effects" and could therefore be regulated. *Id.* at 631.[6]

3. The role of de novo *review in the protection of free speech rights.* This Court's practice of vigorously reviewing the record to ensure that speech rights have been respected has not been limited to cases arising out of state professional regulatory boards. *De novo* review has been the norm in the full range of free speech cases, reflecting this Court's acknowledgment of the special role courts play in securing First Amendment rights.

In *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), this Court independently reviewed the evidence of "actual malice" presented to a jury in a libel trial "to determine whether it could constitutionally support a judgment for respondent." *Id.* at 284-85. Because speech rights were involved, the Court explained that

> [t]his Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser* v. *Randall*, 357 U.S. 513, 525. In cases where that line must be drawn, the rule is that we '*examine for ourselves* the statements in issue and the

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[6] In *Friedman* v. *Rogers*, 440 U.S. 1 (1979), this Court upheld a Texas statute prohibiting the practice of optometry under trade names, but only after concluding that the opportunity for deception presented by the practice was "substantial and well demonstrated," including evidence of actual deceptive practices that had occurred. *Id.* at 15.

> circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment ... protect.' *Pennekamp* v. *Florida*, 328 U.S. 331, 335. *We must 'make an independent examination of the whole record,' Edwards* v. *South Carolina*, 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Id. at 285 (first omission in original) (emphases added) (citations omitted); *Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 688-89 (1989); *Jacobellis* v. *Ohio*, 378 U.S. 184, 187-88 (1964). Indeed, "[t]he simple fact is that First Amendment questions of 'constitutional fact' *compel this Court's de novo review.*" *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 509 n.27 (1984) (emphasis added). In the context of reviewing factual findings by a district court judge, this Court in *Bose* emphasized that *de novo* review was required "particularly in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech." *Id.* at 503. In such cases, "[j]udges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold." *Id.* at 511.[7]

As *Bose* detailed, this Court has applied its independent judgment to review the record to resolve many free speech questions, including whether statements were "'fighting words,'" *Street* v. *New York*, 394 U.S. 576, 592 (1969); whether advocacy was directed to inciting lawless action, *Hess* v. *Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam); what appeals to the "'prurient interest'" or is "'patently offensive'" under the standard obscenity test, *Miller* v. *California*, 413 U.S. 15, 30 (1973), and *Jenkins* v. *Georgia*,

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[7] *Bose* thus stands for giving "quite little deference to the initial factfinder" in First Amendment cases. *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 920 n.40 (1995) (Thomas, J., dissenting).

418 U.S. 153, 159-61 (1974); and whether particular expression constituted child pornography or protected speech, *New York* v. *Ferber*, 458 U.S. 747, 774 (1982). See *Bose*, 466 U.S. at 505-08. In all these circumstances, this Court has independently reviewed the record to define the line between protected and unprotected speech.

Bose recognized that the same kind of judicial line-drawing involved in obscenity and libel cases is also required in commercial speech cases. *Id.* at 504 n.22. As with obscene speech and libelous statements, any commercial speech deemed to be "inherently misleading" receives no First Amendment protection. *R.M.J.*, 455 U.S. at 203. The critical question in such cases, then, turns on a "constitutional fact:" whether the challenged speech is, in fact, "inherently misleading," or is, in fact, obscene, or is, in fact, uttered with reckless disregard for the truth.

Review of determinations of such "constitutional facts" in the commercial speech context ought to be, and, as discussed above, has been, as vigorous as it is in other categories of protected speech. As this Court has emphasized, because in a "free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions.... the free flow of commercial information is indispensable." *Virginia State Bd. of Pharmacy* v. *Virginia State Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). As such, "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980).[8]

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[8] As noted above, *supra* at 6-8, consumers of petitioner's services have a keen interest in petitioner's right to brand itself in a way that enhances its reputation. For many companies, the choice of an auditor is often critical to validating their financial condition to the public. Under these circumstances, when the need for a service is critical, this Court has noted

The application of *de novo* review in the commercial speech context is well grounded in sound policy. Because the conclusion that speech is "misleading" is actually a declaration that certain speech is unprotected by the First Amendment, the determination of what counts as "misleading" takes on the character of declaring what the law is, rather than what the facts are. *Bose*, 466 U.S. at 501 n.17 ("At some point, the reasoning by which a fact is 'found' crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment."). The declaration of "what the law is" has always been understood as a matter for appellate courts to determine without deference to factfinders.

Relatedly, *de novo* appellate review promotes uniformity in the development and application of free speech law. The plurality in *Peel* noted that the "abdication of review would create radical disparities in First Amendment protections from State to State." 496 U.S. at 108 n.16. As this case readily demonstrates, there is little reason to believe that state professional regulatory boards view the judgments of their out-of-state peers with the same kind of respect that courts give to judicial decisions from other jurisdictions. Despite the fact that no other state board has rejected the name change, the Board in North Carolina refused to allow it. *De novo* court review would better ensure that such anomalous regulatory action would not, as here, distort the free flow of important commercial speech nationwide.

Further, deference to professional regulatory boards is unfounded because the professionals who staff such boards

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that "the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Bates*, 433 U.S. at 364. The would-be regulators of that flow thus bear the burden of justifying the need to regulate commercial speech. *See Zauderer*, 471 U.S. at 646; *Edenfield*, 507 U.S. at 770.

are unfamiliar with free speech principles and their proper application. In addition, their professional interest may cloud their judgment. Here, for example, only one of the Board's members had practiced with a national firm, and he was retired. The trend to nationalize and even internationalize accounting practices that petitioner seeks to follow here is in tension with the financial interests of many of the Board's members. Similarly, in *Bates* and *R.M.J.*, state bar committees (composed of established attorneys) took action against young lawyers who sought to break into the legal market by advertising their services—a potential risk to established practices. See *Bates*, 433 U.S. at 378 (holding that ban on advertising "serves to perpetuate the market position of established attorneys"). In *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973), this Court recognized that such pecuniary incentives were sufficiently powerful to prohibit members of the Alabama Board of Optometry from participating in license revocation proceedings of optometrists practicing in a competing branch of the profession. Similar concerns support the application of *de novo* review here.

State professional regulatory boards stand in sharp contrast with the regulators at the Federal Trade Commission, who are not competitors of those being regulated, who "deal[] continually with cases" of alleged deceptive advertising, and whose determinations in those cases this Court has indicated warrant some deference. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385-86 & n.14 (1965). There is no reason to believe that the North Carolina courts believed that this Court's deference to the FTC supported deference to the Board in this case. And any such reliance on *Colgate-Palmolive* would have been erroneous. In any event, this Court should accept review in this case to clarify that deference to the FTC in deceptive advertising cases is based on its unique degree of experience and expertise in the field, which helps promote uniformity in application of First

Amendment principles, and that those principles do not extend to state professional regulatory boards.

The potential to undermine what should be the uniform protections of the First Amendment is particularly acute in this case because of the unduly deferential standard of review the North Carolina courts employed. The North Carolina Court of Appeals defined the "substantial evidence" that was necessary to support the Board's ruling as follows:

> "Substantial evidence is "'relevant evidence a reasonable mind *might accept as adequate* to support a conclusion.'" A reviewing court "'may not substitute its judgment for the agency's,'" even if a different conclusion may result under a whole record review."

App. 5a (emphasis added) (quoting *Vanderburg* v. *North Carolina Dep't of Revenue*, 608 S.E.2d 831, 839 (N.C. Ct. App. 2005)). Moreover, the court held that "[t]he burden of proof is not on the administrative agency or the Board to justify its decision, but rather it rests upon the petitioner" to show that the decision was not supported by "'substantial evidence.'" *Id.* at 13a (quoting *In re Appeal of Maharishi Spiritual Ctr. of Am.*, 569 S.E.2d 3, 12 (N.C. Ct. App. 2002)). For petitioner to vindicate its rights before the North Carolina courts, therefore, it needed to prove that no reasonable mind could agree with the Board's decision. This standard has built into it room for disagreement—the Board's decision should stand even if the court would not have reached the same conclusion on its own. In short, the Board's standard builds into court review the very disparity in protection for First Amendment rights that *Peel* proclaims is inappropriate.

When a state professional regulatory board is called upon to make findings of constitutional significance, deference to its judgment amounts to a near complete abdication of judicial review. There is nothing to determine in this case except whether petitioner's name change is misleading. Under the highly deferential standard of review adopted by the court of

appeals here, a restriction that a court recognizes is inconsistent with the First Amendment could nonetheless be upheld, thus damming the free flow of commercial information necessary to our economy. Both speakers and listeners are injured by the rule applied by the courts below.

4. Deferential review is unworkable here. For all the doctrinal reasons stated above, deferential review of the Board's ruling is misplaced. It is also inappropriate in this case because it cannot be sensibly applied given the way the Board procedurally disposes of cases before it that involve constitutional questions.

The Board itself does not decide constitutional questions. To the contrary, the decision here was simply a rote application of the Board's own regulations governing CPA firm names.[9] See App. 21a (citing 22 N.C. Admin. Code 8N .0307). Indeed, as one Board member conceded during the hearing, petitioner's proposed name is not deceptive, but "it's just that it gets caught up in the language of our rules." The Board cited *Friedman* for the proposition that trade

[9] Notably, many other states, including several of those that approved petitioner's proposed name change, have similar rules. *See, e.g.*, Ala. Admin. Code r. 30-X-6-.05; Ariz. Admin. Code § 4-1-455.03; Ark. Code R. 019 00 001; Cal. Bus. & Prof. Code § 5060; 3 Colo. Code Regs. 705-1; Conn. Agencies Regs. § 20-280-15c; Del. Code Regs. § 24 100; D.C. Mun. Regs. tit. 17, § 2513; Fla. Stat. § 473.321; Ga. Comp. R. & Regs. 20-12-.17; Idaho Admin. Code r. 01.01.01.406; Ind. Code § 25-2.1-12-5; Iowa Code § 2.13; Kan. Stat. Ann. § 1-316; Ky. Rev. Stat. Ann. § 325.380; Md. Code Regs. 09.24.01.06; 252 Mass. Code Regs. 3.05(5); Minn. Stat. Ann. § 326A.10; 50-022-001 Miss. Code R. § 3.1; Mo. Code Regs. Ann. tit. 4, § 10-3.060; 288 Neb. Admin. Code § 11-002; Nev. Admin. Code § 628.140; N.H. Rev. Stat. § 309-B:14; N.J. Stat. Ann. § 45:2B-62; N.M. Code R. § 16.60.4.9; N.Y. Educ. Law § 7408; Ohio Admin. Code 4701-11-05; Okla. Admin. Code § 10:15-39-8; Or. Rev. Stat. § 673.320; R.I. Code R. § 02-020-004; S.C. Code Ann. Regs. 1-21; S.D. Admin. R. 20:75:05:15; Tenn. Comp. R. & Regs. 0020-3-.15; 22 Tex. Admin. Code § 501.83; Vt. Code R. 04-030-010 § 10.12; Va. Code Ann. § 54.1-4414; Wash. Admin. Code 4-25-661; W. Va. Code, § 30-9-26; Wis. Admin. Code Accy § 1.405; Wyo. Code R. ch. 6, § 5(c).

names may be prohibited, *id.* at 24a, and viewed that as sufficient authority to reject the proposed name change in this case without identifying anything in the record that supported the restriction. This approach, of course, is flatly at odds with the analysis of the Court in *Friedman*. *Friedman* v. *Rogers*, 440 U.S. 1, 15 (1979). Because the Board itself admittedly never considered the constitutional question in light of any evidence that could illuminate whether petitioner's name change would be misleading, there was no judgment to which a court could defer.

The supposedly "substantial evidence" in the record in this case was actually placed in the record by the Board *during the litigation in court* when the issue was whether the Board's ruling should be upheld. The Board did not consider the evidence to which the court deferred when it rejected petitioner's name change. App. 7a (discussing evidence supposedly supporting Board's conclusion that name change would be misleading). To allow the Board to demonstrate that "substantial evidence" supports its decision by creating evidence *after* the decision has been made and thereby restrict petitioner's commercial speech makes a mockery of judicial review, and completely de-fangs the protections of the First Amendment.

5. The Board's decision in this case could not survive de novo *review.* This case thus turns on whether petitioner's name change was properly characterized as "inherently misleading."[10] The Board determined that petitioner's name change violated the rules governing appropriate names for North Carolina CPA firms. *Supra* at 8-10. When forced in court to explain *why* the violation of that rule warranted restricting petitioner's commercial speech rights, the Board

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[10] The North Carolina Court of Appeals did not specify whether it believed there was substantial evidence to support a finding that petitioner's name change was "inherently" or only "potentially" misleading. App. 8a. As noted above, either way, it was error to review the question only for substantial evidence. *Supra* at 11 n.2.

argued that petitioner's name change was misleading. The Board made no effort to defend the restriction on petitioner's speech as "in furtherance of a substantial state interest," *Central Hudson*, 447 U.S. at 563-64, beyond the interest in preventing consumers from being misled. Unless petitioner's name change is deemed misleading, there is, therefore, no basis for rejecting it.

Petitioner's proposed name, RSM McGladrey & Pullen, LLP, Certified Public Accountants, would convey two pieces of accurate commercial information: petitioner is affiliated with RSMI and petitioner is a firm of Certified Public Accountants. Notably, the Board has never disputed and could not seriously contest the truth of these two points. Instead, the Board rejected the name change based upon its assertion that the public might draw inaccurate conclusions about petitioner or other RSM entities.

First, the Board believes that the public may inaccurately conclude that "RSM" is the name of a practicing accountant who is a partner in petitioner. App. 21a-22a. The only support for this assumption is the Board's own rule prohibiting "[t]he name of a non-CPA owner in a CPA firm name."[11] *Id.* at 21a. But the Board cannot rely upon the circular argument that because petitioner's proposed name allegedly violates the Board's rules it can *constitutionally* be prohibited. *Ibanez*, 512 U.S. at 144. And the Board cites no studies, such as those presented in *Went For It*, to indicate what North Carolina residents in fact believe or understand about the names in a CPA firm title.

More importantly, the Board's legitimate interest in protecting against deception plainly *does not* require that all names in a CPA firm title be practicing accountants. To the contrary, many firms in North Carolina utilize the names of

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[11] Because "RSM" is not a "non-CPA owner" of petitioner (which is wholly-owned by its partners), however, it is far from clear that this rule is even applicable.

long dead partners, retired partners, or even foreign firm names[12] as brands. The record does not contain even one example of a person who was surprised to learn, for example, that Mr. Deloitte retired from the practice of accounting in 1897 (or, for that matter, that Messrs. McGladrey and Pullen are deceased), much less that such person actually suffered any *harm* from such "mistakes." The Board's concerns are even more specious in light of the fact that petitioner does not market its services to the public at large, but specializes in servicing sophisticated business clients. Because petitioner's "prospective clients are sophisticated and experienced business executives," the State's interest in policing that relationship is diminished. *Edenfield*, 507 U.S. at 775. And, if one of those business clients was unsure of the status of "RSM," a simple call to the Board or to petitioner would clear up that issue in short order. See *Ibanez*, 512 U.S. at 145 n.9 (holding that public's ability to clear up potential misunderstanding by a phone call reduces state's interest in regulating speech). The record simply does not indicate that this supposedly inaccurate conclusion is likely, much less that it would be harmful.

Second, the Board believes that petitioner's name change would create "the impression that any firm using a name that begins with 'RSM,' regardless of the nature of that firm, is a lawful CPA firm." App. 22a. Once again, there is simply no evidence to support this assertion.[13] Indeed, petitioner seeks

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[12] "KPMG," for example, is a series of initials representing four accounting firms, both domestic and foreign. Grant Thornton, another accounting firm licensed to practice in North Carolina, is a combination of the former names of an American and a British accounting firm.

[13] The Board apparently includes RSM McGladrey, Inc. as an entity that could be confused with petitioner. App. 22a. As noted above, however, the *only* evidence in the Board's declaratory ruling to support this claim of confusion is a company directory that clearly and correctly explains their relationship. *Id.* at 22a-23a. The additional evidence later

to go even further than North Carolina law requires to prevent this confusion by identifying itself *in its name* as a Certified Public Accounting firm, something its competitors have not done. Despite the fact that the brands utilized by petitioner's competitors, such as Ernst & Young, KPMG, BDO Seidman, Deloitte, and Dixon Odom, are shared by attest and non-attest firms, the Board has not identified even one instance in which someone was harmed by mistakenly identifying a non-attest firm as a firm licensed to audit financial statements. Nor has the Board presented any evidence that any other RSM entity performed a service that only petitioner was licensed to do.

The dissent by Judge Wynn in the court of appeals underscores the fact that the Board's rejection of petitioner's name change could not survive *de novo* review. Judge Wynn scrutinized the record and concluded that it presented "mere[] conjecture" and no "concrete reason" for the Board's decision. App. 15a.

The Board's inability to put forth any evidence in its favor is not surprising, for petitioner and its competitors have a strong interest in ensuring that *all* of the entities affiliated with their respective brands act within their proper limits. If, as concerns the Board, an RSM entity other than petitioner were approached to perform auditing services within North Carolina, that entity would simply refer the business to petitioner; to do otherwise would undermine the purpose of the RSM brand. The Board thus failed to demonstrate that any real harm would result even if some hypothetical member of the public might incorrectly approach another RSM entity to perform services that only petitioner is authorized to perform. See *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664 (1994) ("When the government defends a regulation on speech as a means to redress ... anticipated harms, ... [i]t must demonstrate that the recited harms are real, not merely conjectural ....") (Kennedy, J.).

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put forth by the Board before the courts similarly fails to show that this supposed risk of confusion constitutes a real harm. *See supra* at 10-11.

Once again, it is the Board's burden to "demonstrate[] with sufficient specificity that any member of the public could have been misled by [petitioner's] constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes." *Ibanez*, 512 U.S. at 139. Under *de novo* review of the record, it is apparent that the Board is hopelessly short of meeting this burden. This Court should grant a writ of certiorari to clarify that such decisions are entitled to no deference and are instead subject to meaningful, *de novo*, judicial review.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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August 4, 2006

APPENDIX

APPENDIX A

SUPREME COURT OF NORTH CAROLINA

No. 469A05

MCGLADREY & PULLEN, LLP,
Petitioner,

v.

NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS,
Respondent.

April 7, 2006

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C.App. ___, 615 S.E.2d 339 (2005), affirming an order entered on 18 March 2004 by Judge Orlando F. Hudson, Jr. in Superior Court, Wake County. Heard in the Supreme Court 14 March 2006.

Parker Poe Adams & Bernstein, LLP, by William L. Rikard, Jr., Jack L. Cozort, and Kristin R. Poolos, Charlotte, for petitioner-appellant.

Allen and Pinnix, P.A., by Noel L. Allen and M. Jackson Nichols, Raleigh, for respondent-appellee.

PER CURIAM.

AFFIRMED.

APPENDIX B

COURT OF APPEALS OF NORTH CAROLINA

No. COA04-911

MCGLADREY & PULLEN, LLP,
Petitioner,

v.

NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS,
Respondent.

July 19, 2005.

TYSON, *Judge.*

McGladrey & Pullen, LLP ("petitioner") appeals from order adopting and affirming the declaratory ruling issued by The North Carolina State Board of Certified Public Accountant Examiners (the "Board"). We affirm.

I. Background

Petitioner is a North Carolina limited liability partnership and licensed by the Board to practice in North Carolina as a certified public accounting ("CPA") firm. Petitioner specializes in providing audit and attest services for mid-sized businesses. Petitioner is affiliated with RSM McGladrey, Inc., a national consulting, wealth management, and corporate finance firm, through an "Alternative Business Structure."

RSM McGladrey, Inc. is a member of RSM International, Inc., a subsidiary of H & R Block. "RSM" is an acronym for Robson Rhodes, a United Kingdom firm, Salustro Reydel, a firm in France, and petitioner.

In Fall 2002, petitioner sought to change its name from "McGladrey & Pullen, LLP" to "RSM McGladrey & Pullen, LLP, Certified Public Accountants." Petitioner gave notice of intent to change its name to each jurisdiction in which it was registered.

On 1 October 2002, Robert N. Brooks, the Board's executive director, recommended petitioner's name change request be rejected on the grounds the initials "RSM" could deceive the public by conveying the impression that any firm using a name that begins with "RSM" is a lawful CPA firm.

On 11 March 2003, petitioner submitted its request to the full Board for a declaratory ruling. By letter dated 2 May 2003, the Board informed petitioner that the Board adopted the declaratory ruling on 28 April 2003 denying petitioner's request and ruling petitioner's proposed name change to "RSM McGladrey & Pullen, LLP, Certified Public Accountants" violated N.C. Admin. Code. Tit. 21, 8N.0307.

On 30 May 2003, petitioner filed a petition in the Wake County Superior Court for judicial review. The petition was heard on 26 February 2004 and on 18 March 2004, the trial court entered an order affirming the Board's declaratory ruling. Petitioner appeals.

II. Issues

Petitioner contends the trial court erred by: (1) violating petitioner's right to free speech and equal protection under the North Carolina and United States Constitutions; (2) affirming the declaratory ruling of the Board after it acted outside of its statutory authority and jurisdiction in violation of N.C. Gen.Stat. § 150B-51(b)(2); and (3) being arbitrary and capricious in affirming the Board's ruling.

III. Standard of Review

Upon our "judicial review of an administrative agency's final decision, the substantive nature of each assignment of

error dictates the standard of review." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (citations omitted). N.C. Gen.Stat. § 150B-51(b) (2003) states:

> in reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

"This standard of review applies to judicial review of an agency's decision, whether at the superior or the appellate court level." *Vanderburg v. N.C. Dep't of Revenue*, 168 N.C.App. 598, __, 608 S.E.2d 831, 839 (2005) (citing *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm.*, 103 N.C.App. 527, 532, 406 S.E.2d 613, 616-17 (1991) (superior court review)); *see also Crist v. City of Jacksonville*, 131 N.C.App. 404, 405, 507 S.E.2d 899, 900 (1998) (appellate court review) (citing *Shoney's v. Bd. of Adjustment for City of Asheville*, 119 N.C.App. 420, 421, 458 S.E.2d 510, 511 (1995)).

This Court has held that fact-intensive issues

> "'such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.'" This standard of review requires the reviewing court to analyze all the evidence provided in the record "to determine whether there is substantial evidence to justify the agency's decision." Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." A reviewing court "may not substitute its judgment for the agency's," even if a different conclusion may result under a whole record review.

Vanderburg, 168 N.C.App. at ___, 608 S.E.2d at 839 (internal quotations and citations omitted).

In *In re Appeal of the Maharishi Spiritual Ctr. of Am.*, our Supreme Court revered [sic] the Court of Appeals for reasons stated in the dissenting opinion and explained the Court's proper role under the whole record test when reviewing an administrative agency's ruling or judgment.

> The whole record test is not "a tool of judicial intrusion." This test does not allow a reviewing court to substitute its own judgment in place of the Commission's judgment even when there are two reasonably conflicting views. The whole record test merely allows a reviewing court to determine whether the decision of the Commission is supported by substantial evidence.
>
> "'Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" "The credibility of the witnesses and resolution of conflicting testimony is a matter for the administrative agency to determine." This Court cannot

> overturn the Commission's decision if supported by substantial evidence.

152 N.C.App. 269, 284, 569 S.E.2d 3, 12 (2002) (J. Tyson dissenting) (internal quotations and citations omitted), *per curiam rev'd*, 357 N.C. 152, 579 S.E.2d 249 (2003).

IV. Free Speech

Petitioner argues the trial court erred in affirming the Board's declaratory ruling because it violated petitioner's constitutional freedom of speech.

"'Untruthful speech, commercial or otherwise, has never been protected for its own sake.'" *Friedman v. Rogers*, 440 U.S. 1, 9, 99 S.Ct. 887, 59 L.Ed.2d 100, 110 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Konigsberg v. State Bar*, 366 U.S. 36, 49, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961)). In *Central Hudson Gas v. Public Service Comm'n*, the United States Supreme Court defined commercial speech as an "expression related solely to the economic interests of the speaker and its audience." 447 U.S. 557, 563-64, 100 S.Ct. 2343, 65 L.Ed.2d 341, 348 (1980) (citing *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-64, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Friedman v. Rogers*, 440 U.S. 1, 11, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979)).

The United States Supreme Court also held "the First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." *Central Hudson Gas*, 447 U.S. at 561, 100 S.Ct. at 2349, 65 L.Ed.2d at 348 (citing *Virginia Pharmacy Bd.*, 425 U.S. at 761-63, 96 S.Ct. at 1825-26, 48 L.Ed.2d at 346). The Supreme Court explained:

> The First Amendment's concern for commercial speech is based on the informational function of advertising.

> Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. *The government may ban forms of communication more likely to deceive the public than to inform it,* or commercial speech related to illegal activity. If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech.

Id. at 564, 100 S.Ct. at 2350, 65 L.Ed.2d at 348-49 (internal citations omitted) (emphasis supplied).

The respondent Board is a State agency created by N.C. Gen.Stat. § 93-12 to regulate CPA firms. One of the Board's duties is to regulate the manner in which CPA firms hold themselves out to the public. N.C. Admin. Code tit. 21, 8N.0307(a) (2004) entitled, "Deceptive Names Prohibited," allows the Board to prohibit a CPA firm from using any name that would have "the capacity or tendency to deceive."

The parties agree the regulation at issue restricts petitioner's commercial speech. The parties disagree on whether adding "RSM" and "Certified Public Accountants" to petitioner's trade name is misleading, tends to be deceptive, and whether the regulation as applied, violates petitioner's First Amendment rights.

Evidence before the Board included: (1) a U.S. federal claims court case wherein a managing director of RSM McGladrey, Inc. testified and was referred to as an expert in auditing; and (2) several filings with the Securities and Exchange Commission showing the public misperception and referring to "RSM McGladrey" as a public accounting firm and confusing ownership and services rendered by the firm.

The Board may "ban forms of communication more likely to deceive the public than to inform it." *Central Hudson Gas,*

447 U.S. at 563, 100 S.Ct. at 2350, 65 L.Ed.2d at 349 (citing *Friedman*, 440 U.S. at 13, 99 S.Ct. at 896, 59 L.Ed.2d at 113; *Ohralik v. Ohio State, Bar Assn.*, 436 U.S. 447, 464-65, 98 S.Ct. 1912, 1923-24, 56 L.Ed.2d 444, 461 (1978)). The Board exercised its discretion under its statutory authority to determine what firm names are acceptable. N.C. Admin. Code. tit. 21, 8N.0307(a). We may not substitute our judgment for the agency's and must only look to see if there is substantial evidence to support their conclusion. *Watkins v. N.C. State Bd. Of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). The Board considered and found relevant and substantial evidence tending to show petitioner's proposed name could be confusing and deceptive and determined petitioner's proffered firm name is deceptive to the general public. *Central Hudson Gas*, 100 S.Ct. at 2350-51, 447 U.S. at 563-64, 65 L.Ed.2d at 349.

Petitioner fails to show the Board's findings of fact are not supported by substantial evidence and those findings do not support the court's conclusions of law. The trial court's holding that the Board did not violate petitioner's freedom of speech under the United States or North Carolina Constitutions is affirmed.

V. Equal Protection

Petitioner alleges the names "RSM McGladrey Inc." and "RSM McGladrey & Pullen L.L.P. Certified Public Accountants" are not deceptive or misleading. Petitioner asserts the Board failed to apply its standard of review equally.

"Inequalities and classifications, however, do not, *per se*, render a legislative enactment unconstitutional." *Cheek v. City of Charlotte*, 273 N.C. 293, 298, 160 S.E.2d 18, 23 (1968) (citing *Ramsey v. Veterans Commission*, 261 N.C. 645, 135 S.E.2d 659; *State v. Trantham*, 230 N.C. 641, 55 S.E.2d 198 (1949); 2 Strong, N.C. Index 2d, *Constitutional Law* § 20 (1967)). Our Supreme Court has held "[c]lassi-

fications are not offensive to the Constitution 'when the classification is based on a reasonable distinction and the law is made to apply uniformly to all the members of the class affected.'" *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 67, 366 S.E.2d 697, 700-01 (1988) (quoting *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E.2d 18 (1968)). The Court also held "[c]lassification[s][are] permitted when (1) it is based on differences between the business to be regulated and other businesses and (2) when these differences are rationally related to the purpose of the legislation." *Id.* at 67, 366 S.E.2d at 701 (citing *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940)).

Petitioner argues it received unequal review and treatment from the Board and cites the Board's approval of Grant Thornton as a trade name in 2002. The Board's rulings in Grant Thornton's case and petitioner's case are easily distinguishable.

Grant Thornton is a long established CPA firm in North Carolina and was using its approved trade name prior to 1999. Grant Thornton continued its operation as a CPA firm with the "Grant Thornton" name. "RSM McGladrey & Pullen, LLP Certified Public Accountants" is not a long established CPA firm in North Carolina. RSM is not an individual CPA nor is it a licensed CPA firm in any state or United States territory. Petitioner's proposed name change occurred after the grand-fathering provision established in 1999 to allow continued use of existing trade names expired.

The Board's regulation allowing grand-fathering of trade names is based on criteria that petitioner does not meet. N.C. Admin. Code tit. 21, 8N.0307(c) (2004) states any CPA firm that has continuously used an assumed name approved by the Board prior to 1 April 1999 may continue to use the assumed name subject to certain restrictions. Furthermore, petitioner concedes that RSM International, Inc.'s status is different from the "Big Four" accounting firms. RSM International,

Inc. is a non-CPA association and not a national or international CPA firm.

Petitioner fails to show the evidence before the Board and the record before the trial court lacked substantial evidence to support the Board's findings of fact, or that those findings support the Board's conclusions of law. *Vanderburg*, ___ N.C.App. at ___, 608 S.E.2d at 839. Petitioner fails to proffer evidence of a similarly situated firm that received unlawful preferential treatment or treatment inconsistent with the Board's decision in petitioner's case. *Poor Richard's, Inc.*, 322 N.C. at 67, 366 S.E.2d at 700-01. We affirm the trial court's holding that the Board did not violate petitioner's constitutional right of equal protection.

VI. Statutory Authority of the Board

Petitioner alleges the trial court erred by finding the Board acted within its statutory authority. The Board is established and promulgated by N.C. Gen.Stat. § 93-12. This State agency is charged, in part, with certifying and licensing CPAs and adopting or issuing guidelines for their conduct. The Board adopted guidelines for the names CPA firms could use in holding themselves out to the public:

> (a) Deceptive Names Prohibited. A CPA or CPA firm shall not trade upon the CPA title through use of any name that would have the capacity or tendency to deceive. . . .
>
> (b) Style of Practice. It is considered misleading if a CPA firm practices under a name or style which would tend to imply the existence of a partnership or registered limited liability partnership or a professional corporation or professional limited liability company of more than one CPA shareholder or CPA member or an association when in fact there is no partnership nor is there more than one CPA shareholder or CPA member of a CPA firm. For example, no CPA firm having just one CPA

owner may have as a part of its name the words "associates" or "company" or their abbreviations. It is also considered misleading if a CPA renders non-attest professional services through a non-CPA firm using a name that implies any non-licensees are CPAs.

(c) Any CPA firm that has continuously used an assumed name approved by the Board prior to April 1, 1999, may continue to use the assumed name, so long as the CPA firm is only owned by the individual practitioner, partners, or shareholders who obtained Board approval for the assumed name. A CPA firm (or a successor firm by sale, merger, or operation of law) may continue to use the surname of a retired or deceased partner or shareholder in the CPA firm's name so long as that use is not deceptive.

N.C. Admin. Code tit. 21, 8N.0307(a)-(c) (2004).

Petitioner appeals the trial court's decision affirming the Board's finding the proposed firm name "RSM" was misleading to the public. The Board possesses the authority to regulate CPA firms and CPA firm names. N.C. Gen.Stat. § 93-12 (2003); N.C. Admin. Code tit. 21, 8N.0307. The Board promulgates rules and guidelines to regulate whether an offered firm name is deceptive to the general public. *Id.; see also* N.C. Admin. Code tit. 21, 8N.0307. The Board determines if firm names are acceptable or deceptive. *Id.;* N.C. Admin. Code tit. 21, 8N.0307. Substantial evidence in the record supports the Board's findings that petitioner's proposed name could be deceptive to the public. *Vanderburg,* ___ N.C.App. at ___, 608 S.E.2d at 839; *see also Central Hudson Gas.*, 447 U.S. at 563-64, 100 S.Ct. at 2350-51, 65 L.Ed.2d at 349 (The government may ban commercial speech that is "likely to deceive.").

Petitioner fails to show the trial court's conclusion that its proposed trade name could be deceptive is not supported

by substantial evidence. The trial court's holding that the Board acted within its statutory jurisdiction and authority is affirmed.

VII. Arbitrary and Capricious

Defendant asserts the trial court acted in an arbitrary and capricious manner in affirming the Board's ruling.

> Where an allegation is made that a final agency decision is not supported by competent evidence or is arbitrary and capricious, the trial court must review the decision under the whole record test. The whole record test requires the trial court to examine all of the evidence before the agency in order to determine whether the decision has a rational basis in the evidence. If the trial court concludes there is substantial competent evidence in the record to support the findings, the agency decision must stand. The trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency.

Clark Stone Co. v. N.C. Dep't of Env't & Natural Res., 164 N.C.App. 24, 31-32, 594 S.E.2d 832, 837 (2004) (internal citations omitted).

We previously held substantial evidence supports the findings of fact and conclusions of law of the Board's ruling and the trial court's order. After reviewing the whole record and finding substantial evidence, we hold the trial court did not act in an arbitrary and capricious manner in affirming the Board's ruling. This assignment of error is overruled.

VIII. Conclusion

Petitioner fails to show the findings of fact and conclusions of law of the trial court are not supported by substantial evidence. Neither this Court nor the trial court may substitute our own judgment for that of the Board where the record shows substantial evidence supports their decision.

The State, through the Board, may regulate deceptive commercial speech. Regulation of deceptive commercial speech does not violate petitioner's freedom of speech. *Central Hudson Gas*, 447 U.S. at 563, 100 S.Ct. at 2350, 65 L.Ed.2d at 349. Substantial evidence in the whole record supports the Board's unchallenged findings of fact, which in turn supports the Board's conclusions of law that petitioner's proposed name had "the capacity or tendency to deceive." N.C. Admin. Code tit. 21, 8N.0307.

Petitioner fails to present any evidence that the Board treated another company similarly situated to petitioner differently or provided preferential treatment in violation of its equal protection rights.

The burden of proof is not on the administrative agency or the Board to justify its decision, but rather it rests upon the petitioner to show the Boards's "findings and conclusions are unsupported by competent, material, and substantial evidence." *In re Appeal of Maharishi Spiritual Ctr. of Am.*, 152 N.C.App. at 284, 569 S.E.2d at 12. Petitioner cannot shift its burden on appeal to the Board utilizing extraneous comments made during the hearing by a Board member as a basis to reverse the Board's unchallenged findings of fact under our standard of review.

The trial court's findings of fact and conclusions of law are supported by substantial evidence in the whole record and are not arbitrary or capricious. Petitioner failed to show any abuse of discretion. The trial court's order is affirmed.

Affirmed.

Judge ELMORE concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

In this case, the North Carolina State Board of Certified Public Accountant Examiners ("CPA Board") prohibits McGladrey & Pullen, LLP ("McGladrey & Pullen") from changing its name to "RSM McGladrey & Pullen, LLP, Certified Public Accountants." In denying this name change, the CPA Board cited N.C. Admin. Code tit. 21, r. 8N.0307(a) (Mar.2003) which provides,

> A CPA or CPA firm shall not trade upon the CPA title through use of any name that would have the capacity or tendency to deceive.

McGladrey & Pullen argues that the CPA Board has failed to meet its burden to show that the proposed name will mislead or deceive the public and, therefore, violates its right to free speech. I agree that the CPA Board has failed to show how the name will be misleading or deceiving. Accordingly, I respectfully dissent.

The United States Supreme Court has long held that "commercial speech" is protected by the First Amendment of the United States Constitution. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770, 96 S.Ct. 1817, 48 L.Ed.2d 346, 363 (1976). The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 65 L.Ed.2d 341, 349 (1980) (internal citations omitted).

In *Cent. Hudson Gas & Elec. Corp.*, the United States Supreme Court set out three prongs the State must meet to validly restrict commercial speech: (1) "The State must assert a substantial interest to be achieved by restrictions on commercial speech[;]" (2) "the restriction must directly advance the state interest involved[;]" and (3) "if the governmental interest could be served as well by a more limited

restriction on commercial speech, the excessive restrictions cannot survive." *Id.*, at 560, 100 S.Ct. at 2350, 65 L.Ed.2d at 350.

McGladrey & Pullen acknowledges that the CPA Board has a "substantial interest in protecting the public from misleading and deceptive names and advertising by CPAs[,]" meeting the first prong of the *Cent. Hudson Gas & Elec. Corp.* test. But McGladrey & Pullen argues that the CPA Board failed to meet the second prong, because the proposed name is not deceptive or misleading and the CPA Board's asserted harms are merely speculative. I agree.

The second prong of the *Cent. Hudson Gas & Elec. Corp.* test "is not satisfied by mere speculation or conjecture[.]" *Edenfield v. Fane*, 507 U.S. 761, 770, 113 S.Ct. 1792, 123 L.Ed.2d 543, 555 (1993). In the CPA Board's declaratory ruling denying the name change, it stated "the use of 'RSM' in the name of the firm would have the capacity or tendency to deceive the public by giving the impression that any firm using a name that begins with 'RSM,' regardless of the nature of the firm, is a lawful CPA firm." But this is not a concrete reason for the restriction; instead, it is merely conjecture. Indeed, the record shows that a CPA board member stated, "I think it's important to note that whether it's deceitful or not, we didn't—we don't believe that. It's just that it gets caught in the language of our rules more than anything else." This cannot satisfy the second prong of the *Cent. Hudson Gas & Elec. Corp.* test, as there was merely a speculative reason that the CPA Board denied the proposed name change. *See, e.g., Michel v. Bare*, 230 F.Supp.2d 1147, 1154 (D.Nev.2002) (State failed to show that a rule prohibiting an attorney from using the trade names "Your Legal Power" and "Su Poder Legal," directly advanced the State's interest).

Moreover, the CPA Board's emphasis on the addition of three letters, "RSM", ignored the addition of the words "Certified Public Accountants" to the end of the proposed name

change. Indeed, the proposed name of "RSM McGladrey & Pullen, LLP, Certified Public Accountants" when compared to "RSM McGladrey, Inc." would be less misleading than the current name of "McGladrey & Pullen, LLP." As McGladrey & Pullen points out, the word "McGladrey" has been used in both names for five years without prohibition, and there is no evidence that the public has been deceived by those names.

In sum, I would hold that the CPA Board's denial of McGladrey & Pullen's proposed name change impermissibly restricted McGladrey & Pullen's right to free speech under the First Amendment of the United States Constitution. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563-64, 100 S.Ct. at 2350-51, 65 L.Ed.2d at 349-50. Accordingly, I respectfully dissent from the majority opinion and would reverse the trial court's order.

APPENDIX C

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NORTH CAROLINA COUNTY OF WAKE

[Filed March 18, 2004]

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03 CVS 7412

MCGLADREY & PULLEN, LLP,
Petitioner,

v.

NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS,
Respondent.

ORDER ON PETITION FOR JUDICIAL REVIEW

THIS PETITION FOR JUDICIAL REVIEW, coming on and being heard by the undersigned Judge Presiding on February 26, 2004, and the Court, having considered the evidence of record, the briefs and arguments of Counsel, the Court makes the following:

FINDINGS OF FACT

1. Pursuant to N.C.G.S. § 150B-51, no additional evidence was taken on the Petition for Judicial Review.

2. Pursuant to N.C.G.S. § 150B-46, the Petitioner did not except to any Findings of Fact and Conclusions of Law of the N.C. Board of CPA Examiners. Therefore, all Facts of the Declaratory Ruling are binding on this Court.

3. The Court conducted *de novo* review as to all issues except the issues of whether there was substantial evidence to

support the Declaratory Ruling and whether the decision is arbitrary and capricious.

4. Petitioner initiated the Request for the Declaratory Ruling and it submitted the request in the name of a currently licensed CPA firm, McGladrey & Pullen, LLP. Petitioner requested that the Board issue ". . . a Declaratory Ruling that under 21 NCAC 8N .0307 (CPA Firm names) McGladrey is entitled to change its name to "RSM McGladrey & Pullen, LLP, Certified Public Accountants."

5. The Record establishes that the Board had the jurisdiction and authority to issue its Declaratory Ruling and that the Declaratory Ruling was issued in accordance with the Board's regulations and G.S. 150B, the Administrative Procedure Act.

6. The Record establishes that the Board properly exercised its authority to consider to what or whom the prefix "RSM" refers. "RSM" does not stand for the names of former members of the CPA firm. The Petitioner does not own the name "RSM" but regards it as a brand name that will make it appear as large as some competitors. Indeed, and as stated *supra*, RSM stands for Robson Rhodes, a U.K. firm; Salustro Reydel, a firm in France; and McGladrey & Pullen, LLP. The Record indicated that either [sic] Robson Rhodes nor Salustro Reydel are licensed CPA firms in North Carolina nor any other United States territory.

7. Because these two entities are non-CPA firms, 21 NCAC 8N .0307(a) clearly prohibits the use of "RSM" in the title of the Petitioner CPA firm.

8. In addition, the Board's rules necessitate the examination of the composition and partnership structure of the entity in determining whether a proposed name is misleading or deceptive. See 21 NCAC 8N .0202.

9. Further, neither anything named "RSM" nor Rhodes nor Salustro are partners in the CPA firm.

10. The Record establishes that there is confusion among the public, employees, clients and state regulators about the differences between Petitioner and RSM McGladrey Inc., a non-CPA firm.

11. The Declaratory Ruling properly held that "Petitioner's proposed name 'RSM McGladrey & Pullen, LLP' is sufficiently similar to the name 'RSM McGladrey, Inc.' that it has the capacity or tendency to deceive as prohibited by the Board's Rules."

12. Petitioner argued that the Declaratory Ruling denied its right to Commercial Free Speech. The Court affirms the Declaratory Ruling and adopts the Board's conclusion that regulation of a fictitious brand trade name by a state is appropriate because the potential for public deception outweighed the interest of Commercial Free Speech.

13. The Board does not seek to otherwise prohibit Petitioner's truthful disclosure of its affiliation with "RSM International" in its advertising material.

14. Petitioner argued that the Declaratory Ruling was arbitrary and capricious and violated Equal Protection. The Court affirms the Declaratory Ruling because Petitioner failed to meet its burden of proof as to these two claims.

WHEREFORE, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

15. The Board had the jurisdiction and authority to issues its Declaratory Ruling.

16. The Board did not act in excess of its authority or jurisdiction.

17. The Declaratory Ruling was not affected by an error of law in its interpretation of the applicable statutes and regulations.

18. The Declaratory Ruling of the Board is supported by substantial evidence of Record.

19. The Declaratory Ruling does not violate the constitutional provisions cited in the Petition for Judicial Review.

20. The Declaratory Ruling is not arbitrary and capricious.

WHEREFORE, THE COURT GRANTS THE FOLLOWING RELIEF:

I. This Petition for Judicial Review was properly filed and duly accepted.

II. The Declaratory Ruling of the N.C. Board of Carolina State Board Of Certified Public Accountant Examiners is affirmed and adopted as the Order of this Court.

III. The Petition for Judicial Review is denied and dismissed.

ORDERED, ADJUDGED & DECREED this 18th day of March, 2004.

/s/ Orlando F. Hudson, Jr.
ORLANDO F. HUDSON, JR.
Superior Court Judge Presiding

APPENDIX D

DECLARATORY RULING

RE: 21 NCAC 8N .0307

PETITIONER: McGladrey & Pullen, LLP
3600 West 80th Street, Suite 500
Bloomington, Minnesota 55431-1002

DATE REQUEST RECEIVED: March 11, 2003

BACKGROUND INFORMATION:

Petitioner is a CPA limited liability partnership with office locations registered to do business in North Carolina. Petitioner requests a name change from "McGladrey & Pullen, LLP," to "RSM McGladrey & Pullen, LLP, Certified Public Accountants."

QUESTION:

Can Petitioner use the letters "RSM" in changing the firm name from "McGladrey & Pullen, LLP," to "RSM McGladrey & Pullen, LLP, Certified Public Accountants?"

CONCLUSION:

No. 21 NCAC 8N .0307 (a) states (in pertinent part), "A CPA or CPA firm shall not trade upon the CPA title through use of any name that would have the capacity or tendency to deceive." The name of one or more former members of the CPA firm, as defined in 21 NCAC 8N .0301, may be included in the CPA firm name. The name of a non-CPA owner in a CPA firm name is prohibited. Additionally, 21 NCAC 8N .0307(b) provides that it is "considered misleading if a CPA firm practices under a name or style which would tend to imply the existence of a partnership or registered limited liability partnership . . . when in fact there is no partnership. . . ." As Petitioner has confirmed, "RSM" in and of itself is not a person or entity, but a brand name. Currently, Petitioner is affiliated with a

non-cpa corporation named "RSM McGladrey, Inc." Petitioner is also affiliated with a network of service firms (including non-cpa firms) named "RSM International." RSM McGladrey, Inc., is a subsidiary of another non-cpa corporate entity although it employs CPAs and purports to offer "accounting" services to the public. Although Petitioner is part of an "Alternative Business Structure," neither RSM McGladrey, Inc., nor RSM International are partners in or otherwise have an equity interest in Petitioner.

As explained in 21 NCAC 8N .0202, "Deception includes . . . representations or omissions which a CPA either knows or should know have a capacity or tendency to deceive." Such conduct is prohibited whether or not anyone has been actually deceived. Regardless of intent, the use of "RSM" in the name of the firm would have the capacity or tendency to deceive the public by giving the impression that any firm using a name that begins with "RSM," regardless of the nature of the firm, is a lawful CPA firm. In reality, "RSM" firms may be involved in other business arrangements and lines of commerce that are forbidden to CPA firms and there is no assurance that all members of "RSM" are certified public accountants.

Another use of "RSM" in Petitioner's firm name with the capacity or potential for public confusion or deception is the simultaneous use of the nearly identical name by "RSM McGladrey, Inc." Even though RSM McGladrey, Inc., is not (and does not propose to be) a CPA firm in this state, it is closely associated with the Petitioner. For example, as explained in *Hoover's Company Capsule Database* (accessed April 16, 2003),

> "RSM McGladrey will gladly be your accounting firm, if you happen to be a mid-sized business. The company, which was created in 1999 when H&R Block acquired the non-attest assets and business of McGladrey &

> Pullen, has offices throughout the US. The company focuses on businesses in such industries as construction, health care, and manufacturing, offering such services as consulting, auditing, accounting, tax services, and international business services. *The company, through an alliance with McGladrey & Pullen and other accounting firms worldwide, offers clients in some 75 countries services under the RSM International name.*" [Emphasis added]

On the other hand, *Hoover's* described Petitioner as follows:

> "McGladrey & Pullen LLP provides audit and attest services, as well as certain tax and consulting services, from offices throughout the US. Services include bookkeeping, financial statement preparation, independent audits, and SEC filing assistance. The company also offers business planning, information technology, transfer tax, business tax consulting, and other services through an affiliation with H&R Block subsidiary RSM McGladrey, whose offices provide McGladrey & Pullen with global reach."

The importance of clearly delineating between duly authorized CPA firms and affiliated entities is essential to the preservation of the CPA firms' autonomy and independence. As this Board explained in its November 20, 2000, Interpretative Statement regarding "Alternative Business Structures":

> "A CPA firm and the related ABS shall ensure that the client and the public know that the two entities are separate and distinct in nature and operation so that neither the client nor the public are confused by the relationship between the CPA firm and the ABS."

Petitioner's proposed name "RSM McGladrey & Pullen, LLP" is sufficiently similar to the name "RSM McGladrey,

Inc." that it has the capacity or tendency to deceive as prohibited by the Board's Rules. As the Board's records indicate, the similarity is not only potentially confusing to the public, but actually confusing to Petitioner's own licensed staff members.

The fact that Petitioner might include the words "Certified Public Accountant" or "CPA" in its name would not solve that problem since there is no requirement that CPA firms use those words or letters in their names. (For example, 21 NCAC 8K .0201(c) provides: "The use of "CPA" or "Certified Public Accountant(s)" in the corporate name is encouraged, but not required.") Thus, although Petitioner might reduce potential public confusion by adopting the words "Certified Public Accountant" or the letters "CPA" as part of its firm name, this step only makes it clear that Petitioner is a CPA firm. It does not make it clear to the public that other "RSM" entities are NOT CPA firms.

The United States Supreme Court has held, *Friedman v. Rogers*, 440 US. 1, 59 L. Ed. 2d 100, 99 S. Ct. 887 (1979), that regulation of a trade name by the state was constitutionally permissible since the potential for public deception outweighed the interest of commercial free speech. The Board is not seeking to prohibit Petitioner's truthful disclosure of its affiliation with "RSM International," but only to disallow the use of "RSM" in the firm's name which is prohibited by the above-referenced rule.

Approved by the Board
April 28, 2003

/s/ O. Charlie Chewning Sr.
President